

ENDORSED
FILED
ALAMEDA COUNTY

AUG 16 2001

CLERK OF THE SUPERIOR COURT
By T. GURATANA
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MICHAEL DIPIRRO

10

11

12

SUPERIOR COURT OF THE STATE OF CALIFORNIA

13

IN AND FOR THE COUNTY OF ALAMEDA

14

15

MICHAEL DIPIRRO, an individual)	No. H217762-7
)	
Plaintiff,)	<u>CONSENT JUDGMENT</u>
)	
v.)	
)	
DYNABRADE, INC.; and DOES 1)	
through 1000,)	
)	
Defendants.)	
_____)	

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This Consent Judgment ("Agreement" or "Consent Judgment")
is entered into by and between Michael DiPirro, a California
citizen, and Dynabrade, Inc., a New York corporation
("Dynabrade"), as of July 9, 2001 (the "Effective Date"). The
parties agree to the following terms and conditions:

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CONSENT JUDGMENT

1 **WHEREAS:**

2 A. Michael DiPirro is an individual residing in
3 San Francisco, California, who seeks to promote awareness of
4 exposures to toxic chemicals and improve human health by
5 reducing or eliminating hazardous substances contained in or
6 produced by consumer and industrial products;

7 B. Dynabrade is a company that currently
8 manufactures, distributes and sells in the State of California
9 certain power tools (such as Dynabrade's Model T Sander) whose
10 customary use and application may produce fumes, gases or dust
11 which contain chemicals listed pursuant to Proposition 65
12 (California Health & Safety Code §25249.5 et seq.), including
13 lead (or lead compounds), crystalline silica, arsenic and
14 chromium (hexavalent compounds) (the "Listed Chemicals");

15 C. The products whose customary use and
16 application may produce fumes, gases or dust which contain,
17 one or more of the "Listed Chemicals" and which are covered by
18 this Agreement are set forth in Exhibit A (the "Products").
19 The Products have been manufactured, distributed and/or sold
20 by Dynabrade for use in California since at least January 17,
21 1997;

22 D. On November 6, 2000, Michael DiPirro first
23 served Dynabrade and other public enforcement agencies with a
24 document entitled "60-Day Notice of Violation" which provided
25 Dynabrade and such public enforcers with notice that Dynabrade
26 was allegedly in violation of Health & Safety Code §25249.6

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28 **CONSENT JUDGMENT**

1 for allegedly failing to warn purchasers that the customary
2 use and application of certain products it sells or otherwise
3 offers for use in California may expose users to Proposition
4 65-listed chemicals;

5 E. On January 17, 2001, Michael DiPirro filed a
6 complaint entitled Michael DiPirro v. Dynabrade, Inc., et al.
7 in the Alameda County Superior Court (the "Lawsuit"), naming
8 Dynabrade as a defendant and alleging violations of Business &
9 Professions Code §17200 and Health & Safety Code §25249.6 on
10 behalf of individuals in California who allegedly have been
11 exposed to the "Listed Chemicals" produced by the customary
12 use of certain Dynabrade products;

13 F. DiPirro and Dynabrade desire to enter into this
14 Agreement to resolve the matters pertaining to the Lawsuit and
15 avoid the time, expense and uncertainty of further litigation;

16 G. Nothing in this Agreement shall be construed as
17 an admission by Dynabrade of any fact, finding, issue of law,
18 or violation of law, nor shall compliance with this Agreement
19 constitute or be construed as an admission by Dynabrade of any
20 fact, finding, conclusion, issue of law, or violation of law.
21 However, this paragraph shall not diminish or otherwise affect
22 the obligations, responsibilities, and duties of Dynabrade
23 under this Agreement.

24 **NOW THEREFORE, MICHAEL DIPIRRO AND DYNABRADE AGREE AS FOLLOWS:**

25 1. **Product Warnings.** Dynabrade shall initiate
26 revisions to its health hazard warnings for its Products to
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28 CONSENT JUDGMENT

1 provide the language set forth in section 1.1 below.
2 Beginning immediately from the Effective Date, Dynabrade will
3 take steps that are commercially reasonable to ensure that the
4 warning set forth in section 1.1 (the "Warning") is placed
5 upon Products sold in the State of California. Dynabrade
6 agrees that it will provide the warning on all products that
7 are manufactured by Dynabrade for sale or distribution in the
8 State of California more than four months after the Effective
9 Date of this Agreement for any Products that may contain, or
10 whose customary use may produce fumes, gases or dust that
11 contain, the Listed Chemicals. The Warning shall comply with
12 one of the Warning options set forth in Section 1.1 below.

13 1.1 For all power tools that are likely to
14 expose users to lead (or lead compounds), crystalline silica,
15 arsenic, and/or chromium (hexavalent compounds) or any
16 combination of chemicals listed by the State of California as
17 known to cause cancer as well as birth defects (or other
18 reproductive harm), such Products shall bear the following
19 Warning:

20 **WARNING:** Some dust created by power sanding,
21 sawing, grinding, drilling, and
22 other construction activities
23 contains chemicals known [to the
24 State of California] to cause
25 cancer, birth defects or other
26 reproductive harm. Some examples
27 of these chemicals are:

- lead from lead-based
paints,
- crystalline silica from
bricks and cement and other
masonry products, and

- arsenic and chromium from chemically-treated lumber.

Your risk from these exposures varies, depending on how often you do this type of work. To reduce your exposure to these chemicals: work in a well ventilated area, and work with approved safety equipment, such as those dust masks that are specially designed to filter out microscopic particles.;

[Note: Text in brackets is optional.]

or

WARNING: Some dust created by power sanding, sawing, grinding, drilling, and other construction activities contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.;

The Warning shall be prominently placed upon or with the Products' packaging with such conspicuousness, as compared with other words, statements, designs or devices, so as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

The Warning may be (1) printed in the owner's manual in accordance with Exhibit B or (2) placed on a label that is (a) fastened to the outside of the packaging of the product or on the product. The Warning shall be in a form reasonably consistent with other warnings provided with the Products of Dynbrade. The Warning shall be deemed to provide clear and reasonable warnings for the Listed Chemicals in accordance with Proposition 65, and no other warning shall be required to

1 comply with Proposition 65.

2 2. **Payment Pursuant To Health & Safety Code**

3 **\$25249.7(b)**. Pursuant to Health & Safety Code §25249.7(b),
4 Dynabrade shall pay a civil penalty of \$7,500.00. The payment
5 of \$7,500.00 shall be paid within five (5) calendar days after
6 the Effective Date of this Agreement and shall be held in
7 trust by DiPirro's counsel until the Alameda County Superior
8 Court approves and enters the Consent Judgment. If the
9 Consent Judgment is not approved by the Court, DiPirro will
10 return all funds, with interest thereon at a rate of six
11 percent (6%) per annum, within ten (10) calendar days of
12 notice of the Court's decision. The penalty payment is to be
13 made payable to "Chanler Law Group In Trust For Michael
14 DiPirro". Penalty monies shall be apportioned by DiPirro in
15 accordance with Health & Safety Code §25192, with 75% of these
16 funds remitted to the State of California.

17 Dynabrade understands that the payment schedule as
18 stated in this Consent Judgment is a material factor upon
19 which DiPirro and his attorneys have relied in entering into
20 this Consent Judgment. Dynabrade agrees that all payments
21 will be made in a timely manner in accordance with the payment
22 due dates. Dynabrade will be given a five (5) calendar day
23 grace period from the date payment is due. Dynabrade agrees
24 to pay Michael DiPirro a \$250 per calendar day fee for each
25 day the payment is received after the grace period ends. For
26 purposes of this paragraph, each new day (requiring an

27
28 CONSENT JUDGMENT

1 additional \$250 payment) will begin at 5 p.m. (PST):

2 **3. Reimbursement Of Fees And Costs.** The parties
3 acknowledge that DiPirro offered to resolve the dispute
4 without reaching terms on the amount of fees and costs to be
5 reimbursed, thereby leaving this open issue to be resolved
6 after the material terms of the agreement had been reached,
7 and the matter settled. Dynabrade then expressed a desire to
8 resolve the fee and cost issue concurrently with other
9 settlement terms, so the parties tried to (and did) reach an
10 accord on the compensation due to DiPirro and his counsel
11 under the private attorney general doctrine codified at C.C.P.
12 §1021.5.

13 Dynabrade shall reimburse DiPirro for his fees and
14 costs incurred as a result of investigating, bringing the
15 matter to Dynabrade's attention, litigating and negotiating a
16 settlement in the public interest. Dynabrade shall pay the
17 total sum of \$20,000.00 for investigation fees, attorneys'
18 fees and litigation costs. Dynabrade agrees to pay \$20,000.00
19 within five (5) calendar days of the Effective Date of the
20 Agreement. Such sum shall be held in trust by DiPirro's
21 counsel until the Alameda County Superior Court approves and
22 enters the Consent Judgment. If the Consent Judgment is not
23 approved by the Court, DiPirro will return all funds, with
24 interest thereon at a rate of six percent (6%) per annum,
25 within ten (10) calendar days of notice of the Court's
26 decision. Payment should be made payable to the "Chanler Law
27
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CONSENT JUDGMENT

1 Group".

2 Dynabrade understands that the payment schedule as
3 stated in this Consent Judgment is a material factor upon
4 which DiPirro and his attorneys have relied in entering into
5 this Consent Judgment. Dynabrade agrees that all payments
6 will be made in a timely manner in accordance with the payment
7 due dates. Dynabrade will be given a five (5) calendar day
8 grace period from the date payment is due. Dynabrade agrees
9 to pay Michael DiPirro and his attorneys a \$250 per calendar
10 day fee for each day the payment is received after the grace
11 period ends. For purposes of this paragraph, each new day
12 (requiring an additional \$250 payment) will begin at 5 p.m.
13 (PST).

14 **4. Michael DiPirro's Release Of Dynabrade.**

15 Michael DiPirro, by this Agreement, on behalf of himself, his
16 agents, representatives, attorneys, assigns and in the
17 interest of the general public, waives all rights to institute
18 or participate in, directly or indirectly, any form of legal
19 action, and releases all claims, liabilities, obligations,
20 losses, costs, expenses, fines, damages, penalties,
21 restitution, or injunctive, equitable, legal or other relief,
22 against Dynabrade and its directors, officers, employees,
23 successors or assigns, and its parents, divisions,
24 subdivisions, subsidiaries, sister companies, franchisees,
25 cooperative members, licensees, sales representatives,
26 distributors, wholesalers and retailers who sell Products

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28 CONSENT JUDGMENT

(collectively referred to herein as Dynabrade), whether under Proposition 65 or the Business & Profession Code §17200 et seq., based on Dynabrade's alleged violation of these laws in connection with failure to warn of the exposure to the Listed Chemicals produced by the Products.

5. Dynabrade's Release Of Michael DiPirro.

Dynabrade, by this Agreement, waives all rights to institute any form of legal action against Michael DiPirro and his attorneys or representatives, for all actions or statements made by Michael DiPirro, and his attorneys or representatives, in the course of seeking enforcement of Proposition 65 or Business & Profession Code §17200 against Dynabrade.

6. Intent of Parties That This Agreement Have Preclusive Effect. DiPirro and Dynabrade agree that this Agreement is intended to resolve and preclude any and all claims that were or could have been brought in the case filed by DiPirro against Dynabrade in Alameda County Superior Court, or otherwise brought by any person or entity under Proposition 65, Business and Professions Code Sections 17200 et. Seq., or any other statute or common law rule that involves, relates to or arises out of the alleged failure to warn about exposure to chemicals contained in or produced by any of the Products. The parties agree that this Agreement and the judgment entered pursuant hereto accordingly are intended to, and shall, have full preclusive effect against any other person or entity with respect to such claims, whether purporting to act in his, her

1 or its own interests or in the public interest. The parties
2 further agree that this Agreement is appropriate and adequate
3 to protect the public from any of the acts alleged, or that
4 could have been alleged, in the complaint filed by DiPirro
5 against Dynabrade related to Dynabrade's alleged violations of
6 Proposition 65 and Business & Professions Code Section 17200
7 *et seq.*

8 **7. Non-Admission.** This Agreement is entered into
9 in compromise of disputed claims. Neither the execution of
10 this Agreement and the releases provided for herein, nor the
11 payment of any consideration hereunder, nor any other act or
12 agreement in furtherance of this Agreement, shall be construed
13 in any way as an admission of wrongdoing or liability on the
14 part of any party hereto or any party released hereby.

15 **8. Dynabrade Sales Data.** Dynabrade understands
16 that the sales data provided to counsel for DiPirro by
17 Dynabrade was a material factor upon which DiPirro has relied
18 to determine the amount of payments made pursuant to Health &
19 Safety Code §25249.7(b) in this Agreement. To the best of
20 Dynabrade's knowledge, the sales data provided is true and
21 accurate. In the event that DiPirro discovers facts which
22 demonstrate to a reasonable degree of certainty that the sales
23 data is materially inaccurate, the parties shall meet in a
24 good faith attempt to resolve the matter within ten (10) days
25 of Dynabrade's receipt of notice from DiPirro of his intent to
26 challenge the accuracy of the sales data. If this good faith
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28 CONSENT JUDGMENT

1 attempt fails to resolve DiPirro's concerns, DiPirro shall
2 have the right to rescind the Agreement and re-institute an
3 enforcement action against Dynabrade, provided that all sums
4 paid by Dynabrade pursuant to paragraphs 2 and 3 are returned
5 to Dynabrade within ten (10) days from the date on which
6 DiPirro notifies Dynabrade of his intent to rescind this
7 Agreement. In such case, all applicable statutes of
8 limitation shall be deemed tolled for the period between the
9 date DiPirro filed the instant action and the date DiPirro
10 notifies Dynabrade that he is rescinding this Agreement
11 pursuant to this Paragraph.

12 **9. Product Characterization.** Dynabrade
13 acknowledges that for each of the Products listed in Exhibit
14 A, the customary use or application of the Products may
15 produce fumes, gases or dust that contain, lead (or lead
16 compounds), crystalline silica, arsenic and chromium
17 (hexavalent compounds) and Plaintiff alleges that the
18 customary use or application of the Products is likely to
19 expose users to lead (or lead compounds), crystalline silica,
20 arsenic and chromium (hexavalent compounds), substances known
21 to the State of California to cause cancer and/or birth
22 defects (or other reproductive harm). In the event that
23 Dynabrade obtains analytical, risk assessment or other data
24 ("Exposure Data") that shows an exposure to any or all
25 Products poses "no significant risk" or will have "no
26 observable effect," as each such standard is applicable and as
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28 CONSENT JUDGMENT

1 each is defined under Health & Safety Code §25249.10(c) and
2 Dynabrade seeks to eliminate the warnings, then Dynabrade
3 shall provide DiPirro with ninety (90) days prior written
4 notice of its intent to limit or eliminate the warning
5 provisions under this Agreement based on the Exposure Data and
6 shall provide DiPirro with all such supporting Exposure Data.
7 Within ninety (90) days of receipt of Dynabrade Exposure Data,
8 DiPirro shall provide Dynabrade with written notice of his
9 intent to challenge the Exposure Data (in the event that he
10 chooses to make such a challenge). If DiPirro fails to
11 provide Dynabrade written notice of his intent to challenge
12 the Exposure Data within ninety (90) days of receipt of
13 Dynabrade's notice and the Exposure Data, DiPirro shall waive
14 all rights to challenge the Exposure Data, and Dynabrade shall
15 be entitled to limit or eliminate the warning provisions
16 required under this Agreement with respect to those Product(s)
17 to which the Exposure Data applies. If DiPirro timely
18 notifies Dynabrade of his intent to challenge the Exposure
19 Data, DiPirro and Dynabrade (a) may stop its efforts to
20 eliminate the warnings upon notice to DiPirro with no further
21 liability or obligations or (b) shall negotiate in good faith
22 for a period not to exceed thirty (30) days following receipt
23 of Dynabrade's notice to attempt to reach a settlement of this
24 issue. If a settlement is not reached, DiPirro and Dynabrade
25 agree to submit such challenge to the superior court for
26 determination, pursuant to the court's continuing jurisdiction

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1 of this matter under C.C.P. §664.6 and this Agreement. The
2 prevailing party shall be entitled to reasonable attorneys'
3 fees and costs associated with bringing a motion brought under
4 this paragraph to the court for determination.

5 **10. Severability.** In the event that any of the
6 provisions of this Agreement are held by a court to be
7 unenforceable, the validity of the enforceable provisions
8 shall not be adversely affected.

9 **11. Attorney's Fees.** In the event that a dispute
10 arises with respect to any provision(s) of this Agreement, the
11 prevailing party shall be entitled to recover costs and
12 reasonable attorneys' fees.

13 **12. Governing Law.** The terms of this Agreement
14 shall be governed by the laws of the State of California.

15 **13. Notices.** All correspondence to Michael DiPirro
16 shall be mailed to:

17 Jennifer Henry or David Bush
18 Bush & Henry
19 4400 Keller Ave., Suite 200
Oakland, CA 94605
(510) 577-0747

20 All correspondence to Dynabrade shall be mailed
21 to:

22 Peter Muthig, Esq.
23 Radcliff Frandsen & Dongell, LLP
24 Fortieth Floor
777 South Figueroa Street
25 Los Angeles, CA 90017-5800
26 (213) 614-1990
27
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1 **14. Compliance With Reporting Requirements.** The
2 parties agree to comply with the reporting form requirements
3 referenced in Health & Safety Code §25249.7(f). Pursuant to
4 the new regulations promulgated under Health & Safety Code
5 §25249.7(f), DiPirro shall present this Consent Judgment to
6 the California Attorney General's office upon receiving all
7 necessary signatures. It will then be presented to the
8 Alameda County Superior Court thirty (30) days later, provided
9 that the Attorney General has not served any objections to
10 this Consent Judgment prior to the end of the thirty day
11 period.

12 **15. Court Approval.** In accordance with the terms
13 set forth in Paragraph 14 of this Agreement, DiPirro and
14 Dynabrade agree to submit the Consent Judgment to the Court
15 for approval and entry pursuant to Code of Civil Procedure §
16 664.6. If, for any reason, the Consent Judgment is not
17 approved by the Court, this Agreement shall be deemed null and
18 void.

19 **16. Counterparts and Facsimile.** This Agreement may
20 be executed in counterparts and facsimile, each of which shall
21 be deemed an original, and all of which, when taken together,
22 shall constitute one and the same document.

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CONSENT JUDGMENT

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17. Authorization. The undersigned are authorized to execute this Agreement on behalf of their respective parties and have read, understood and agree to all of the terms and conditions of this Agreement.

AGREED TO:

AGREED TO:

DATE: 7/13/01

DATE: _____



Michael DiPirro
PLAINTIFF

Dynabrade, Inc.
DEFENDANT

APPROVED AS TO FORM:

APPROVED AS TO FORM:

DATE: _____

DATE: _____

David Bush
Attorneys for Plaintiff
MICHAEL DIPIRRO

Peter Muthig
Attorneys for Defendant
DYNABRADE, INC.

CONSENT JUDGMENT

1 **17. Authorization.** The undersigned are authorized
2 to execute this Agreement on behalf of their respective
3 parties and have read, understood and agree to all of the
4 terms and conditions of this Agreement.
5

6 **AGREED TO:**

AGREED TO:

7
8 DATE: _____

DATE: 7/11/01

9
10 _____
11 Michael DiPirro
12 PLAINTIFF


13 _____
14 Dynabrade, Inc.
15 DEFENDANT

16 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

17
18 DATE: _____

DATE: _____

19
20 _____
21 David Bush
22 Attorneys for Plaintiff
23 MICHAEL DIPIRRO

24 _____
25 Peter Muthig
26 Attorneys for Defendant
27 DYNABRADE, INC.

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17. Authorization. The undersigned are authorized to execute this Agreement on behalf of their respective parties and have read, understood and agree to all of the terms and conditions of this Agreement.

AGREED TO:

AGREED TO:

DATE: _____

DATE: 7/11/01

Michael DiPirro
PLAINTIFF

Michael Blat

Dynabrade, Inc.
DEFENDANT

APPROVED AS TO FORM:

APPROVED AS TO FORM:

DATE: _____

DATE: 7/12/01

David Bush
Attorneys for Plaintiff
MICHAEL DIPIRRO

Peter Muthig

Peter Muthig
Attorneys for Defendant
DYNABRADE, INC.

CONSENT JUDGMENT

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17. Authorization. The undersigned are authorized to execute this Agreement on behalf of their respective parties and have read, understood and agree to all of the terms and conditions of this Agreement.

AGREED TO:
DATE: _____

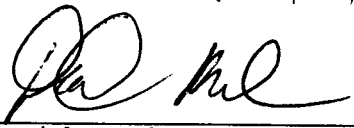
AGREED TO:
DATE: _____

Michael DiPirro
PLAINTIFF

Dynabrade, Inc.
DEFENDANT

APPROVED AS TO FORM:
DATE: 7/12/01

APPROVED AS TO FORM:
DATE: _____


David Bush
Attorneys for Plaintiff
MICHAEL DIPIRRO

Peter Muthig
Attorneys for Defendant
DYNABRADE, INC.

Exhibit A

EXHIBIT A

- 1
 - 2
 - 3 Dynafile Machines
 - 4 Mini-Dynafile II
 - 5 Dynafile II Machines
 - 6 Electric Dynafile Machines
 - 7 Dynabelter Machines
 - 8 Dynangle Machines
 - 9 Dynangle II Machines
 - 10 Dynastraight Machines
 - 11 Dynisher Machines
 - 12 Dynafile III Machines
 - 13 Dynascalers Machines
 - 14 Dyninger Machines
 - 15 Buffers Machines
 - 16 Wet Tool Machines
 - 17 Stockade Machine
 - 18 Sander/Polishers Machines
 - 19 Dynafile Machines
 - 20 Disc Sanders Machines
 - 21 Depr Ctr Whl grinders
 - 22 Drills Machines
 - 23 Cut-Off Tools
 - 24 Autobrade Red Tools
 - 25 Automotive Machines
 - 26 Mini-Orbital Sanders
 - 27 2-Hand orbital Machines
 - 28 5", 6", 8" Gear Machines
- CONSENT JUDGMENT

- 1 Dynabug Machines
- 2 Model "T" Machines
- 3 Elec Orbital Machines
- 4 Dynorbital Supreme (066)
- 5 Dynorbital Supreme (067)
- 6 Dynaline Machines
- 7 Dynalocke Machines
- 8 Virtubrade Machines
- 9 Pencil Grinder Machines

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CONSENT JUDGMENT

Exhibit B

EXHIBIT B

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3 1. Warnings in manuals. A Defendant required to
4 provide a warning for power grinders or drill products under
5 subparagraph 1 may provide that warning in the owner's manual
6 for that Product if all of the following conditions are met:

7 a. the warning shall be located in one of the
8 following places in the owner's manual: the outside of the
9 front cover, the inside of the front cover, the first page
10 other than the cover, or the outside of the back cover. The
11 warning shall have the exact content as the warning under
12 subparagraph 1, except that, at the option of the Defendant,
13 the bracketed language may be omitted. The warning shall be
14 printed in a font no smaller than the font used for other
15 safety warnings in the manual. The format shown in
16 subparagraph 1 is illustrative only, provided that the warning
17 meets the other requirements of this section. Alternatively,
18 the warning may be included in a safety warning section
19 consistent with specifications UL 745-1 or UL 45, issued by
20 Underwriters Laboratories Inc, as amended. The warning may
21 either be printed in the manual or contained in a durable
22 label or sticker affixed to the manual. If the graphic is
23 used, and the manual is printed in a single color of ink on
24 paper, then the warning need not contain the yellow color.

25 b. the Product contains a durable label or sticker
26 directing the operator's attention to the owner's manual;

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1 c. the owner's manual is intended by the Defendant
2 to be provided with the original packaging of the Product to
3 the initial consumer/purchaser;

4 d. at least one other safety warning appears in
5 the owner's manual; and

6 e. all or a substantial portion of operation
7 instructions, if any, are contained in the owner's manual.

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